

**Second Addendum to Stipulation and Order Entered in
United States v. Gerke Excavating, Inc., Case Number 03-C-0074-C**

Whereas, the United States and defendant Gerke Excavating, Inc. ("Gerke") entered into a Stipulation and Order in the above-entitled case, which was approved by this Court on September 30, 2004 ("Stipulation");

Whereas, Gerke filed an appeal as to liability only, and the United States Court of Appeals for the Seventh Circuit affirmed the district court's judgment, *see United States v. Gerke Excavating, Inc.*, 412 F.3d 804 (7th Cir. 2005);

Whereas, on June 14, 2006, this Court entered an Addendum to the Stipulation ("First Addendum");

Whereas, on June 26, 2006, the United States Supreme Court granted Gerke's petition for a *writ of certiorari*, vacated the judgment, and remanded the case to the United States Court of Appeals for the Seventh Circuit for further consideration in light of *Rapanos v. United States*, 547 U.S. 715 (2006), *see Gerke Excavating, Inc. v. United States*, 126 S.Ct. 2964 (2006);

Whereas, on September 22, 2006, the United States Court of Appeals for the Seventh Circuit remanded the case to the district court for further proceedings in light of its decision in *United States v. Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006);

Whereas, on April 2, 2007, Gerke filed a subsequent petition for a *writ of certiorari*, which the United States Supreme Court denied on October 1, 2007, *see Gerke Excavating, Inc. v. United States*, 128 S.Ct. 45 (2007);

Whereas on November 29, 2007, this Court issued a Preliminary Pretrial Conference Order which scheduled the remaining proceedings in this litigation;

Whereas the Stipulation, the First Addendum, and this Second Addendum to the Stipulation ("Second Addendum") are intended to constitute a complete and final settlement of the United States' claims against Gerke regarding the Site under the Clean Water Act, 33 U.S.C. §§ 1251-1387 ("CWA"), as set forth in the Complaint; and

Now, therefore, the parties wish to resolve the matter without the need for further litigation and agree to the following terms being Ordered, Adjudged, and Decreed by this Court:

1. Gerke hereby agrees the Site was and is, at all times pertinent to this litigation, subject to regulatory jurisdiction under the CWA. The Site is defined in Paragraph 2.1 of the Final Restoration Work Plan previously approved by this Court.

2. Gerke agrees to pay a civil penalty to the United States in the amount of \$42,500 (the United States will refund \$12,500 of the \$55,000 civil penalty previously imposed by this Court and paid by Gerke).
3. Gerke hereby expressly waives its right to further appeal this Court's summary judgment decision entered on April 6, 2004, the imposition of a civil penalty as set forth in this Second Addendum, the Stipulation entered on September 30, 2004, the First Addendum entered on June 16, 2006, and this Second Addendum, without limitation.
4. The Stipulation, the First Addendum, and this Second Addendum constitute a complete and final settlement of the United States' claims against Gerke regarding the Site under the CWA, as set forth in the Complaint.
5. Each party to this Second Addendum shall bear its own costs and attorneys' fees in this action.
6. Except as amended herein, all other terms and conditions of the prior Stipulation and First Addendum shall remain in full force and effect.
7. The parties acknowledge that after the lodging and before the entry of this Second Addendum to the Stipulation, final approval of this Second Addendum by the United States is subject to the requirements of 28 C.F.R. § 50.7, which provides for public notice and comment.

Whereas, this Court finds that the Stipulation, as amended, and this Second Addendum are a reasonable and fair settlement of the United States' claims against Gerke, and that the Stipulation and this Second Addendum adequately protect the public interest in accordance with the CWA and other applicable federal law,

IT IS SO ORDERED.

Dated and entered this _____ day of _____, 2008.

BARBARA B. CRABB
United States District Judge

ON BEHALF OF THE UNITED STATES:

ERIK C. PETERSON
United States Attorney
Western District of Wisconsin

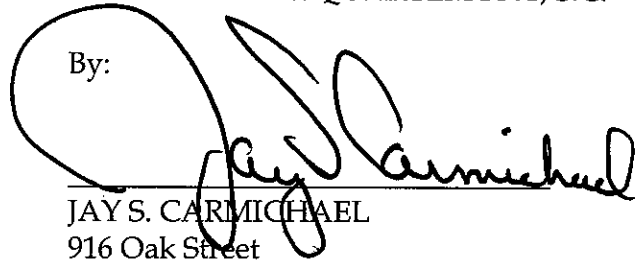
By:

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DEFENDANT GERKE EXCAVATING, INC.
CARMICHAEL & QUARTEMONT, S.C.

By:

A handwritten signature in black ink, appearing to read "Jay S. Carmichael", is written over a horizontal line. The signature is stylized with large, flowing loops.

JAY S. CARMICHAEL

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4/23/08
Date